Party status

Atkinson on behalf of the Gunai/Kurnai People v Victoria [2010] FCA 904

North J, 16 August 2010

Issue

The question in this case was whether the Australian Deer Association (ADA) should to be joined as a respondent to a claimant application made on behalf of the Gunai/Kurnai People (GK # 2). The application for joinder was dismissed because ADA was in default and, in any case, had not demonstrated an interest of the kind required.

Background

The ADA applied to be joined pursuant to s. 84(5) of the *Native Title Act 1993* (Cwlth) which provides that:

> The Federal Court may at any time join any person as a party to the proceedings, if the Court is satisfied that the person's interests may be affected by a determination in the proceedings and it is in the interests of justice to do so.

ADA wanted to become a party because much of the area covered by the application was public land used by ADA's members and others for recreation purposes. ADA said it had 'several serious concerns about the rights and interest of the claim that it regards as racist and divisive to the wider Victorian community'. Justice North noted that ADA rejected the notion that:

- one section of the community should have exclusive possession and use of public land especially when the granting of the exclusive use would be in the hands of those benefiting from it;
- ownership of public land be wholly transferred to Aboriginal Traditional Owner Groups.
- one section of the community is allowed exclusive rights to natural resources;
- natural resources can be owned by one section of the community and traded to the rest of the community for profit and benefit of one single group;
- one group should have sole right to make decisions over the use of public land other than organisations that come under control of the Parliament of Victoria;
- permission for access of public land be vested with a single entity other than organisations which come under the control of the Parliament of Victoria.

Dismissed for default

ADA was given notice of the hearing but did not appear. It was found that this amounted to a default within the meaning of O 35A r 2(f) of the Federal Court Rules, i.e. ADA was in default because it failed to 'prosecute the proceeding with due diligence'. Pursuant to O 35A r 3(a), where an applicant is in default, the court may order that 'the proceeding be stayed or dismissed as to the whole or any part of the

relief claimed by the applicant'. The application for joinder was dismissed because of the 'non-appearance' of ADA—at [4] to [6].

Did not satisfy s. 84(5)

It was also found that the application did not satisfy the requirements of s. 84(5) in that ADA did not have an interest of the kind identified in *Byron Environmental Centre Incorporated v Arakwal People* (1997) 78 FCR 1 (*Byron*). According to North J, ADA had given 'no indication ... of the extent of the use by members of the ADA of the area in question, either by reference to the area of use, or the frequency of use'. GK # 2 was filed to claim some areas that were 'overlooked in bringing the original application'. North J thought that:

> It would be surprising if the ADA had an interest in the area covered by this application. In the absence of further particularisation, it is not possible to determine what, if any, interest the ADA might have in the application area—at [8].

Further, ADA's concerns were emotional or philosophical:

> General concerns about the native title system or philosophical objections to native title rights and interests which might be afforded to native title applicants to the exclusion of the general public do not amount to interests which ground an application to become a party to a native title application—at [9] to [10] referring to *Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493 at 530 and *Byron* at 33.

Decision

The application for joinder was dismissed.